No. 598

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. F. HIGGINS, Master of the Respondent Steamer "Homer," Claimant, and J. S. GOLDSMITH and F. M. GRAHAM, Stipulators, *Appellants*,

vs.

CHARLES H. NEWMAN, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.
IN ADMIRALTY.

BRIEF OF APPELLEE

MARTIN, JOSLIN & GRIFFIN,
Proctors for Appellee.

SEATTLE, WASHINGTON.

NEWMAN & HOLMES, SEATTLE.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

J. F. HIGGINS, Master of the Respondent Steamer "Homer," Claimant, and J. S. GOLDSMITH and F. M. GRAHAM, Stipulators, *Appellants*, vs. CHARLES H. NEWMAN, *Appellee.*	No. 598.

BRIEF OF APPELLEE

STATEMENT OF THE CASE.

This action is brought by the Appellee, Charles H. Newman, to recover damages for personal injuries which he received in a collision of the Steamship "Homer" with the Brigantine "Blakely" on the morning of the 26th day of April, 1899.

At the time of the collision, the Brigantine "Blakely" was lying properly moored to the south side of Schwabacher's wharf, in the city of Seattle, with her

bow toward shore and her stern in shore from 200 to 250 feet from the outer end of the wharf. Appellee was at work as a shipcarpenter on the Brigantine "Blakely," and was stooping over, boring and fastening down a piece of wood on a booby hatch, which was being built on over the main hatch and was at about the center of the hatch, with his face toward the wharf, when the Steamship "Homer" ran into the Brigantine "Blakely," breaking and tearing away her chain plates and carrying away the fore rigging of the vessel.

The end of the fore yard arm of the Brigantine "Blakely" was broken off at the point where the end of the penant is fastened, at about two feet in from the end of the yard arm. The yard arm at the point where it broke, and the penant was attached, was in the neighborhood of six inches in diameter. The penant is a large wire rope, some fifteen feet in length, with a large block attached to the lower end, with ropes running aft on the ship and made fast on the starboard side. When the penant broke from the fore yard arm, it and the block were hurled with great force down across the vessel from starboard to the port side, and, as one witness put it, "It came down like ——the same as you would strike a whip (Brown, Record 102), where it struck the appellee with great force in the back, at about the region of the fifth lumbar vertebrae, as he was running as fast as he could to get ashore. The block was about twelve inches long by about eight inches wide and eight inches thick, and weighs about twenty pounds. The penant weighs in the neighborhood of forty pounds.

The force of the blow knocked the Appellee down, bruising and breaking his back, so that he was unable to rise or have any use or control over his lower limbs, and was carried from the vessel to the wharf in a helpless condition, suffering extreme pain. Appellee was taken to Providence Hospital, where he remained for the period of three weeks, when he was taken on a stretcher to his home at West Seattle, where he now is.

The Appellee at the time of his injury was thirty-seven years of age, a strong, healthy man, a skillful ship carpenter, and had almost constant work, and was earning five dollars a day when bossing a job as foreman, and four dollars a day when working as a ship carpenter; was a married man and had one child.

While in the hospital, the Appellee was unable to eat anything, and the only nourishment taken was milk. He was obliged to lie constantly on his face with his limbs extended, which was the only position in which he could lie. He had lost control of both his bowels and bladder, and had to have mechanical assistance in performing the functions of these organs. At the time Appellee's testimony was taken, and at the time the testimony of his nurse and his physicians was taken, on the 2nd day of August, 1899, he was still unable to lie in any other position than on his face, with his limbs extended, and supported by a pillow. He had no control over his limbs and was unable to turn around or move any portion of his body other than his shoulders, head and arms. In turning or being moved he required the assistance of his nurse, which took con-

siderable time and care and gave the Appellee extreme pain. His kidneys and bladder were injured, and their discharge had a milky appearance and contained puss and other matter. Appellee has suffered almost constant excruciating pain since his injury and has been rendered a cripple for life and unable ever to follow his trade, and has incurred an indebtedness of several hundred dollars for assistance; care and medical attendance.

At the time Appellee was injured it was a bright, clear morning. There was no obstruction of any kind to shut off the view of the officers of the Steamship "Homer," and they had open, clear water for a distance of from six to ten miles, extending out into the bay from the end of the wharf at which they intended to berth the Steamship "Homer," in which to navigate the boat. They gave the Appellee no warning whatever of the approach of the Steamship "Homer," to the Brigantine "Blakely," knowing they had lost control of their vessel, and that there was sure to be a collision.

The vessel is a twin screw steam schooner, with light machinery,and rides high out of the water, and is 146 feet long, with a 38 foot beam. The Steamship "Homer" is supplied with a double set of bell cords, the handles of one set of which come up on the port side of the pilot house within about two feet of each other, and the other set come up on the starboard side of the pilot house. The claim is made by the Captain that when he gave the signals to stop and back the port engine, he did not hear the port gong sound or respond to his signals; that he discovered something wrong with the bell cords, and

without repeating his signals on the port engine gong with the wire or bell cord on the starboard side of the pilot house, which he could have done instantly, he gave signals on the starboard bell to back the starboard engine, and that his vessel was thereby swerved out of her course, and before his mistake could be discovered the vessel had swung so far in that it was impossible to turn her out, and that the only thing that could be done was to put the helm hard to port, with the view of hitting the "Blakely" a glancing blow, as much as possible.

The Captain gave no orders to the man at the helm whatever, and the man at the helm made no effort whatever to guide the vessel or to keep her in her course and in the direction she was going, but stood idly by at the helm, saw the vessel swerving from her course without changing the helm or endeavoring to guide her at all, and the only order given by the Captain, and the only change made at the wheel, was when the Captain saw that the vessel had swung so far that she could not be turned, he gave the order to put the helm "hard aport."

The vessel is also provided with a speaking tube to the engine room, and with a return tube from the gongs for the return sound, so that the Captain could hear if his signals had been given, on the bridge in front of the pilot house. And from the position in which the Captain was standing on top of the pilot house, he could have reached the whistle cord and signalled the engineer to stop at once, had he exercised any care in the premises whatever.

The Court will observe from the Libellant's Exhibits

"C," "D" and "E," that on the port side of the pilot house the starboard gong bell cord is muffled, and on the starboard side the port gong bell cord is muffled (Record 505, 507, 509.)

This was the first time that the Claimant, Captain Higgins, had taken the Steamship "Homer" out, and was the first time he had ever operated a twin screw vessel. These bell cords were muffled by Captain Higgins, and for what purpose, or what good they could expect from purposely putting one set of bell cords out of use and in a condition so that they could not be used in case the other set failed to work, or of an emergency,—which is the very purpose for which the vessel is provided with a double set—, it is difficult to say, unless it would be that having two sets of bell cords at hand would expose the falsity of their claim as to how the accident, happened and explode their theory of "an inevitable accident."

The Steamship "Homer" was about to put to sea at the time Libellant filed his suit and caused her to be seized by the marshall. The suit was brought for the sum of fifteen thousand dollars damages against the vessel. Libellant was required to bring his suit at once in order to seize the vessel, and at the time the suit was brought it was impossible to determine the full extent of Libellant's injuries. Claimant and Appellants were unable to procure a bond in double the amount of the claim, as required by statute, and at their earnest solicitation, proctors for Libellant, not desiring to impose any hardship upon the Claimant and Appellants, agreed to accept a bond in the sum of

twelve thousand dollars, which it afterward transpired was clearly insufficient to compensate Appellee for the injuries he sustained, and upon which the honorable District Judge awarded damages to the full limit of the bond. The bond stands in the place of the vessel, and unfortunately, in this case, measures the limit of Appellee's recovery. A bond in the sum of twelve thousand dollars, and a cost bond in the sum of two hundred and fifty dollars, was furnished the marshall, and the vessel released.

Exceptions were filed to Claimant's answer by Libellant, which were sustained by the District Judge (Record 31). Whereupon Claimant filed an amended answer, and thereafter an amendment to the amended answer, to which a reply was interposed, alleging that said amended answer was untrue, uncertain and insufficient; and that the amendment to the amended answer was untrue, uncertain and insufficient. The amended answer is irrelevant, immaterial and insufficient, and does not state facts sufficient to in any wise mitigate the damages or release the said Steamship "Homer" from the damages and injuries caused to Libellant or at all, or to constitute a defense to the whole or any part of Libellant's libel as amended.

Appellee contends that the collision was not an inevitable accident, but was caused solely by the fault, careless, negligent and wrongful acts and omissions of the Master and Claimant, J. F. Higgins, of the respondent vessel, and fault on the part of said vessel, in the following respects:

1st. "In signaling the engineer to back the starboard engine without first actually knowing that his intended orders to back and reverse the port engine had been executed by the engineer."

2d. "In not giving attention to the helm, which is the means provided for controlling the course of a vessel under way; and neither one of these errors can be excused by reason of an unknown injury to the pintle."

3d. In running the vessel northward across the harbor and the ends of the wharves, in the city of Seattle, toward Schwabacher's wharf, at which the "Homer" was intending to land, by the port engine, which would at all times have a tendency to turn the vessel into the wharves, and which could only be counteracted by the rudder working against the engine constantly.

4th. In purposely putting one set of the bell cords out of use, and in not using the same when the captain claimed to have discovered defects in the one he used to give signals and that it was not working and that the gong did not sound.

5th. In not using the whistle or speaking tube for the purpose of signaling the engineer to stop the vessel.

6th. In not being in a position where he could hear the return sound of the gong through the return tube when he pulled the bell cords, when he would have known to a certainty that his signals were not received in the engine room.

7th. In running the Steamship "Homer" at an

excessive rate of speed across the harbor and too close to the wharf at the end of which he desired to land, without checking her speed and turning his vessel back so as to make a safe landing, and without observing the running and course of the tide and wind at the time.

8th. In failing to discover the manner in which Appellants claim the pintle was bent, as shown in Claimant's Exhibit No. 6, when the same, if bent as claimed by Claimant, was perfectly apparent and obvious to the most negligent person, and was not more than a foot and a half from the very handle attached to the wire running through the printle with which the signals were given.

9th. In failing to give any danger signal or warning to Libellant or those on board the Brigantine "Blakely," when the Captain saw the course the Steamship "Homer" was taking and that there would be a collision with the "Blakely."

10th. In failing to discover that the bell cord hung in its recoil, and giving two pulls on the bell cord when the spring and life, as it were, were out of the cord, which could be discovered without any difficulty whatever.

That the limit of the amount that Appellee was awarded and could recover was the amount of the bond of Stipulators, and as that was made less than one-half of the amount which Appellee could have required, so as not to work a hardship on Appellants, and this appeal having no merit and being taken for the purpose

of delaying and harassing Appellee, Appellee asks that costs, damages and interest should be awarded under Rule 30 of this Court on the appeal bond in the sum of two thousand five hundred dollars, in addition to the sum of twelve thousand dollars awarded Appellee against Claimant and his Stipulators.

BRIEF OF THE ARGUMENT.

I.

(1) Appellants' first contention is, that the injuries which the Appellee sustained are the result of what they term "an inevitable accident." That there is such a defense we do not deny, but that the party interposing such a defense must show by clear and conclusive proof that the injuries and damage sustained could not possibly have been caused by any act or omission of negligence on their part, is so well settled in law that it will not be necessary to cite authorities.

In this case appellant have not only failed to prove by proof conclusive, but have utterly failed to prove that the injuries caused to appellee could have been caused by any fault or act of negligence on their part; but, on the contrary, their own evidence convicts them of negligence, not only in one respect, but at least in ten different instances, any of which would be sufficient to account for the injuries which they inflicted upon the appellee. From appellant's numerous citations to

the record contained in their brief upon this proposition, a person might be supposed to believe that their propositions were supported by testimony in the record, but the Court will find upon reading the testimony, and from an examination of the same, that their propositions not only lack any support whatever, but that the testimony proves many of their statements to be untrue. And as proctors for appellants are gifted with the ability to make a counter-charge to whatever charge may be made against them, irrespective of the truth, we deem it more advisable and convenient to quote from the testimony itself upon the points.

(2) The Master of the Steamship "Homer" claims to have made an examination of the bell cords while at Moran's wharf, about fifteen minutes prior to the collision. The Court will see from an examination of Libellant's Exhibit "D" (Record 507) that the pintle on the unmuffled bell cord shown in the picture, which is the one claimed by appellants to have gotten out of order by the pintle being bent over, as shown in Claimant's Exhibit No. 6 (Record 560), was exposed unprotected and in open plain view, and the Captain in looking to place his hand on the handle of this cord would necessarily look directly at the pintle, as it was right in his line of vision.

Claimant Higgins testifies (Record 381):

"Q. You did not go down on the main bridge to examine the bell cords at all, did you?

A. When?

Q. Before you started from Moran's?

A. Oh, yes; we pulled the bells both above and down below.

Q. Before you started?

A. Yes; I mean on the lower bridge, where the bells were forward and up above, abaft the pilot house.

Q. Pulled all the bells?

A. All the bells, all four.

Q. You mean to say they were all right at that time?

A. Well, every bell struck and I saw nothing the matter with them.

Q. If that pintle had been bent at that time you you would have noticed it?

A. I do not see how I could have helped it. I might not have noticed it, the bend of the pintle, but if the cap had caught the way it did afterward I certainly would have noticed it."

(And on Record 334):

"Q. When you reached your hand to catch it, your hand would not be over a foot and a half from this pintle in this ship, would it?

A. No.

Q. And in plain view?

A. Yes, sir.

Q. Right beside you?

A. Yes, sir.

Q. Nothing hide it at all?

A. No."

We submit that on Claimants own testimony he either never made an examination of the bell-cords, as

he stated he did, before leaving Moran's wharf, or made it in such a careless and negligent manner as to be equivalent to the same thing. This testimony shows that not to discover a defect at so vital a point in the machinery of the vessel as this printle was, which was so open and apparent, and upon which the Captain was almost required to place his hand in making the examination which he says he made, establishes the clearest kind of negligence. And this bend in the printle is the "Latent defect," as they style it, upon which they base their defense of "an inevitable accident." The Honorable District Judge properly found the Captain negligent in this respect.

(3) The Claimant, Captain Higgins, was also negligent in running his vessel across the ends of the wharves of the city, which lay to the east, in going in a northerly direction from Moran's wharf to Schwacher's wharf, on this port engine, with his starboard engine at rest, for the reason that the port engine would have a tendency to turn and drive his vessel into the wharves, and could only be kept out by the counter action of the helm or rudder.

Captain Newhall testified (Record 268):—

"Q. Would it not be negligent for the captain of the steamer "Homer," in going in a northerly direction with a southwest wind, to run his boat by the port engine when he was intending to make a landing at the outer end of the wharf?

A. I do not know what it would have been on his part; I would not have run the port engine.

Q. Would it not have been proper to run the starboard engine instead of the port engine?

A. I think so.

Q. Had he run the starboard engine instead of the port engine, would it have been possible for this collision to have happened?

A. I think not.

Q. Is not that the usual manner in which captains run their vessels in making a landing at the wharf, at the end of the wharf, similar to such a landing as the "Homer" was about to make?

A. I should certainly run on the starboard engine; if I was going to run only one, I would run the starboard one.

Q. So as to keep the vessel from going into the wharf?

A. Yes; going in below the wharf.

Q. That would be the object of running a starboard engine?

A. Yes, sir.

Q. If the port engine was running it would be more likely to cause the vessel to strike in there against the wharf, would it not?

A. To turn her down, to turn her to the right. She has two screws here and she is going from the southwest up toward the northwest to go across the end of that dock. If she is going ahead on this one, it would have a tendency to turn her around to the right, whereas if he took the starboard engine the effect would have been to turn her the other way." * * *

(And on Record 255):

"Q. If he had been making a landing as a landing is ordinarily made, instead of getting away in the slip as he did, could not he just as well have backed the port engine and sent the starboard engine forward and escaped hitting the wharf altogether?

A. I suppose so; sure. A double screw boat with good power ought to turn around in her own length by going ahead on one engine and backing on the other.

Q. What would you say as to the seamanship in making such a landing as has been described that the "Homer" made here in coming in collision?

A. I would not like to answer that question.

Q. I would ask you for your opinion on it, Captain?

A. Well, I would think of course—I never met the captain, and I do not know who he was—but I would think that he was a man of very little experience."

Captain Higgins himself admits that he never ran a twin screw vessel before and that this was his first experience with the Steamer "Homer," but that he had a brother who used to run a twin screw vessel (Record 381).

"Q. Have you ever been a master of a twin-screw steam schooner before?

A. I never have before this one.

Q. This was the first twin-screw that you have ever operated?

A. No; I have a brother who operated a twin-screw and I was with him in New York. I made several trips with him and pulled the bells.

Q. This is the first one that you operated.

A. This is the first one that I have been master of. I do not think there is another one on the coast."

So that running the vessel from Moran's wharf to Schwabacher's wharf, the point of collision, by the port engine, was certainly to say the least poor seamanship.

(4) The Claimant, Captain Higgins, was also negligent in running his vessel at too high rate of speed, and too close to the wharf at which he was about to land, before taking any steps whatever to turn her back.

Captain Higgins testifies (Record 275-6):

"Q. Now, Captain, before the collision, and as you were coming over, what, in your judgment, was the speed of the "Homer" in coming over from Moran's wharf?

A. Probably from four to five miles an hour when she got to going.

Q. Did she use both engines in coming over?

A. Only one engine.

Q. Which engine?

A. The port engine, under what we call a slow bell.

Q. Now, state to the commissioner how the collision took place.

A. On the way down from Moran's wharf, I got what I thought was within an easy distance, where I had time to stop her before she would get down to Schwabacher's wharf; I intended to stop the engine and let her go a little farther, and then back both engines and stop him. And as I put my hand on the bell-pull

to pull the bell to stop her, I notices that the ship that was lying on the north side of Schwabacher's wharf laid so that her bowsprit stuck out beyond. I did not notice this, however, before. Well, as I notices as I was going to pull this bell and stop the engine, I noticed the ship's bowsprit sticking out by the of the wharf.

Q. Which end of the wharf?

A. Where I proposed to land, on the outer end of the wharf; that was sticking out by the end of the wharf.

Q. On the other end of the wharf, from the direction in which your ship was coming?

A. Yes, sir. * * * "

(And on Record 304)—

"Q. How close were you on to Schwabacher's wharf before you observed the bowsprit of the 'Hatton Hall?'

A. Oh, probably more than the length of the vessel away, probably—well about two hundred feet from the wharf.

Q. Two hundred feet south of the wharf?

A. Yes, sir.

Q. You mean the "Homer" was two hundred feet from the wharf?

A. Yes, sir; when I first observed this bowsprit."

For the Captain to allow his vessel to run at the rate of five miles an hour, with the wind and with the tide, to within her own length from the wharf, which is 140 feet, or at most 200 feet, before turning her back, was surely clear negligence.

Captain Bryant testifies (Record 242) that going at the rate of between two or three miles per hour, with no wind, the tide slack, and with both engines backing full speed, they ought to hold her in 300 feet, and at the rate of six miles per hour it would take about 450 to 500 feet in which to stop her.

D. A. Miller testifies (Record 244) that he was on Schwabacher's wharf and saw the collision, and said:—

"Q. About how fast was the the steamer 'Homer' going, in your judgment?

A. As near as I could judge about six miles an hour, I should say."

Captain Bryant testified (Record 231):

METCALFE: "Would not that be the proper navigation of the ship?

A. Well, General, under your statement of facts, when he got his ship into that position, he probably done all he could to get her out, but he had no business to put her in there; the ship had too much headway on her; he was too near the landing before he turned his engines back.

Q. How do you know that he was too near?

A. By your statement; because he would not have got into that shape if she had not been.

Q. I said he rang his bells; he was coming under a slow bell with the port engine.

A. I understand exactly.

Q. And rang the bells a sufficient distance off.

A. Yes.

Q. She was four hundred feet—you know the size of the 'Homer?'

A. I understand all about the 'Homer;' I understand about her and her machinery generally. Your statement of facts, as you have related, led me to answer conclusively that the ship was too near the landing before you turned her back; that is the reason for it. If she was a ship that had heavy power in her to back her, he could have made the landing safely, but she has light power—she has but little power, the power is light, and the ship is heavy, and going in there—I do not know how the tide was, but I presume the tide was ebbing by your statement and the southerly wind, and he could not hold her; he could not turn her back because he was too near the landing, that is all there is to it. * * * "

Captain Newhall testified that the Steamship "Homer" could turn right around almost in her own length with the port engine going forward and the starboard engine backing (Record 265).

Claimant, Captain Higgins, on November 22nd, 1899, testified (Record 373):

"Q. Well, with the port engine going ahead and the starboard engine going astern, within what distance would she turn?

A. She would turn inside of her length—that is, at right angles going this way she would (showing).

Q. Turn in what?

A. Her length.

Q. What is her length?

A. 140 feet. I docked her stern first many times this summer, and she would turn inside of her length?"

So that under appellant's own testimony the proof is conclusive that his vessel was within 140 feet of the wharf when he first undertook to turn her back, for if his signals were given and the engines operated exactly as they did, the vessel would have turned and there would have been no collision, so that Captain Bryant is perfectly right when he states from the results, that they showed conclusively that the Steamship "Homer" was too close to the wharf before the captain undertook to stop her, and on their own testimony convict themselves of negligence in this respect.

(5) The Honorable District Judge was perfectly right in finding the captain guilty of fault "in signaling the engineer to back the starboard engine without first actually knowing that his intended orders to back and reverse the port engine had been executed by the engineer" (Record 440). This finding is unimpeached by any testimony in the record and is, in fact, supported strongly by the testimony of Captain Higgins himself, who says: "When I struck the bells on the port engine I did not hear them plainly; I was not certain that I heard any, but thought I heard one" (Record 277).

Engineer McCarty testified (Record 309-10) that the port gong did not sound at all. That the only bells he got were the two bells on the starboard engine signifying to back.

Captain Higgins testified (Record 387-8):

"Q. And don't you know that if that bell cord hung

in the recoil in the manner you describe, that it took the life out of the pull from the handle?

A. Certainly.

Q. And you would have discovered that the very first time that you made the pull, readily, could you not?

A. I do not know as I get your idea.

(Question read to witness.) A. Well, I did not discover it.

Q. Could it be easily discovered?

A. I do not think easily or I would have discoverd it.

Q. Don't you know that there is quite a strong pull in the recoil?

A. I understand the spring.

Q. Taking the handle back?

A. It pulls the wire back, I understand.

Q. You can feel the strenth of that spring readily when you pull the handle of the bell-pull?

A. I think so.

Q. So that when you pull that to the top and it stopped and did not go back, the life would seem to be out of the handle?

A. Yes, I understand now, I understand what you mean. I am getting at it.

Q. You could have discovered that readily, could you not?

A. Well, I did not discover it.

Q. I know you did not, but that would be readily discovered by any person, would it not?

A. I do not think by any person, not with these slides that you pull. You might if you had seen it and stood right by it.

Q. Well, but from the feeling of the bell the second time you could see that there was no strength in the cord, or the recoil at all until it came to a dead stop; that is true, is it not?

A. Well, I have had lots of experience with bell-pulls, Mr. Martin, but I did not discover that until I went over the pilot house and looked and saw that thing hung up there. It was from the sound that I did not get, that I thought I ought to get, you know, that I noticed that there must have been some confusion somewhere."

Captain Bryant (Record 221) says:

"Q. If the bell-cord had hung in its recoil and stayed in the position which Claimant's Exhibit No. 6 shows it to have stayed, could the captain, could he have discovered that fact even though it was not within his view when he pulled the bell-cord?

A. Why, certainly he ought to have discovered it.

Q. If it hung in that position, the bell-cord would not come back to its original place at all, would it?

A. It would not spring back.

Q. There is a spring to the bell-cord at all times?

A. Yes, sir.

Q. And the moment it would stick in its recoil the cord would have no life or vitality or spring to it?

A. No.

Q. That could be readily discovered, could it not?

A. Sure; no doubt about that."

Captain Newhall (Record 250) testifies:

"Q. I will ask you whether or not there is a recoil spring on the bell-cords and wires on steamships.

A. I never saw any that did not have.

Q. These springs bring the handle back to place, do they not, with some little force?

A. Unless something gets foul about them.

Q. Well, in case something gets foul, can you notice that from the pulling of the handle?

A. Sure.

Q. How would that manifest itself in pulling the handle?

A. It would stop; would not go back.

Q. It would take the spring off the wire, would it not?

A. Yes, sir.

Q. You could easily detect that, could you not?

A. Why, yes, I suppose so. I never failed to.

Q. Would it be probable, in case a man pulled the port engine bell-cord and that the wire passed through deck, through a pintle and cap, as represented by Claimant's Exhibit No. 6, and these other exhibits here, and the cap caught on the pintle as shown by Claimant's Exhibit No. 6, that the captain should again pull that bell-cord twice without discovering that it was caught and not going back?

A. I would not suppose so, sir. I would suppose that he was in doubt about it, and he must be if the thing failed to recoil that he would use his speaking tube or his whistle either.

Q. He could use either speaking tube or whistle, in case the bell-cord happened to get out of order?

A. Yes, sir.
Q. Just as well as the bell-cord?
A. Just as well."

Besides being able to determine from the pull of the bell-cords to a certainty that the gong did not sound, there was the return sound, whereby, had he been paying attention, he could have known to a certainty that his signals were not given on the port engine gong to the engineer. That notwithstanding this fact, with the vessel in the position she was in at the time, approaching closely to the wharf, he gave two signals to the starboard engine to back, when he must have known that the port engine was still going ahead, and if he did not, it showed such a degree of gross carelessness that no other conclusion or finding could be made than that made by the Honorable District Judge in his opinion, that such error cannot be excused by reason of an unknown injury to the pintle.

(6) The Captain was also guilty of negligence "in not giving attention to the helm, which is the means provided for controlling the course of a ship under way." The vessel could have been kept in her course easily had the man at the helm exercised any care whatever and used the only and the very means with which a vessel is provided for guiding and keeping her in her course. This he neglected to do, seeing the vessel changing from her course at a point and position where he must necessarily have been on the alert and should have been extremely attentive to the wheel to keep her in her course while she was in this position

and about to make her landing, and of which the Honorable District Judge says in his opinion (Record 439): "Furthermore, the bent pintle was not the sole cause, nor the proximate cause, of the accident. When the intended signals to stop and reverse the port engine failed, the vessel would have passed clear of the dock, and no harm would have been done, if she had continued on her course; there was no necessity for haste to back the starboard engine, and it was the captain's duty to control the movements of the vessel as to keep her from striking the dock or the other vessels moored there. If the captain had not ordered the engineer to start the starboard engine backward before the port engine had been stopped and reversed, and if he required the man at the wheel to use the helm so as to keep the vessel from swinging to starboard, she would not have gone out of her course, and the accident would not have happened."

Captain Higgins testified (Record 373):

"She was outside of the line of the dock, I should judge, fifty feet, as far off as was convenient for her to to be in order to make the landing at the end of the dock and all of two hundred feet, I am confident, south of Schwabacher's wharf."

(7) Even though the pintle got out of order in the manner in which the Appellants claim it did, it would be no excuse whatever for the accident. The vessel is provided with a double set of bell-cords, so that had the Captain acted seasonably and exercised reasonable care he could have made a landing without any difficulty

whatever. Besides he also had the whistle, the cord of which was right at his hand at the time. He also had the speaking tube.

Captain Bryant says (Record 224) that "A bell-cord cuts no figure with landing a ship with safety. Suppose all the bell-cords had got out of order, there is other ways of communicating with the engineer to direct him whether to back his ship or go ahead. I do not think a bell-cord cuts any figure in landing a ship, Oftentimes bell-cords will part in going into a dock, and they have the speaking tube to communicate with the engineer on watch and direct him which way to work the engine, whether to go ahead or stop, or back full speed, or go ahead full speed. And if he has not a speaking tube he can do it with a whistle."

Captain Newhall says (Record 252):—

"Q. In case the captain of a vessel, such as the Steamship 'Homer' is, was making a landing at a wharf —say Schwabacher's wharf in this city—and the bell-cords caught, as indicated by Claimant's Exhibit No. 6, would that necessarily embarrass the captain in the least in making a good and proper landing?

A. I do not see why it should.

Q. If he had been at his proper position, he could immediately have used the speaking tube, could he not?

A. I suppose so, yes, sir; sure."

So that under the uncontradicted testimony of these witnesses, who are old experienced captains, the fact that the bell-cord hung in its recoil, if it did do so, as

claimed by appellants, would be no excuse whatever for the collision.

(8) Captain Higgins also showed poor seamanship and was guilty of negligence in endeavoring to make a landing with the signals that he states he intended to give. Instead, he should have signaled the starboard engine to go ahead and backed the port engine, which would have been the proper way to land a twin-screw vessel, and would have prevented the vessel from striking or turning into the dock.

Says Captain Newhall, who has had many years' experience with twin-screw vessels (Record 259), on cross-examination:

"Q. Supposing your ship, a twin-screw vessel, such as you say you know the 'Homer' to be, was proceeding along under a slow bell—say at the rate of about three miles an hour—the port engine working, and you desired to stop your boat or stop your engine with a view that the boat might slide into the wharf, at the end of the wharf, by the speed that was on her, what would be your first order as captain?

A. Let me see. I would not have been going ahead on my port engine under these circumstances.

Q. Now, these are the conditions, and what would you have done—the port engine was working slowly—now, what would be your first act?

A. I would stop the port engine and back it and go ahead on the starboard engine."

There can be no question but what this would have been the safer method and course for the Claimant to

have pursued, and if he could have done so without any greater effort or inconvenience than to run his vessel by the port engine when there was more likelihood of an accident happening, as it did happen in this case, than if he had been running the starboard engine, it was surely negligence not to have pursued the safer course.

The George H. Dentz, 12 Fed. 490.

(9) Claimant was also guilty of negligence in failing to give any danger signal or warning to Libellant or those on board the Brigantine "Blakely" when he discovered that he had lost control of the Steamship "Homer" and that there would be a collision with the "Blakely."

Captain Higgins testifies (Record 401-2):—

"Q. You could see the "Blakely" very clearly, Captain from your position? A. Very clearly.

Q. Immediately prior to the collision?

A. Yes, sir; immediately prior to the collision.

Q. And the bulwarks of the "Blakely" are not so high but what you could see a man on deck, are they?

A. Not if I looked for him.

Q. Then the reason that you did not see the Libellant on deck of the "Blakely" is because you did no-look? A. No; you understand I did not look particut larly for anybody.

Q. You did not look for anybody? A. No, sir.

Q. But if you had looked you no doubt could have seen him?

A. Well, I do not know any thing about that. I only know that I did not notice anybody.

Q. And you did believe that there was a possibility there of a collision shortly before you collided?

A. A possibility; yes.

Q. And you know, as a Captain, that there is always someone on a vessel of that size?

A. Well, if anybody had asked me if I thought that there was a man there, I would have told him there probably was.

Q. Then why did you not give a danger signal for the purpose of warning anybody of danger when you were coming in that manner?

A. It did not occur to me that anything of the kind was necessary; the vessel that I had was swinging quickly, and I was in hopes that she would swing clear of the "Blakely," or pull up, you see.

* * * * * *

"Q. If you had blown your whistle you would have given warning to the people who were on the vessel, would you not?

A. Probably they would have heard it. I should judge they would.

Q. The cord of the whistle was right at your hand while you were standing on top of the pilot house?

A. Near by.

Q. Within reach of your hand?

A. Within reach of my hand."

So that under any possible view that can be taken of the defense made by Appellants, they would be clearly liable for failing to give Libellant warning of their approach so that he could flee from the seat of danger,

knowing that they had lost control of their vessel and that there would be a collision, and were guilty of the grossest kind of negligence in not giving Appellee warning of the impending danger, so as at least to have given him a chance to save himself, when it would have required no effort on their part to have given a few blasts with the whistle.

Inland and Seaboard Coasting vs. Tolson, 139 U. S. 551.

(10) It is a well-settled law of navigation that collisions are always to be avoided whenever it is practicable to do so, and when a collision occurs because the proper precautions were not attempted earlier, it is no defense to show that they were attempted as soon as the necessity for precaution was perceived, nor to prove that at the moment of the collision it was too late to render such precautions of any service; precautions must be seasonable.

The Johnson, 76 U. S. (9 Wall.), 146.
The Vanderbilt, 73 U. S. (6 Wall.), 225.
Union Steamship Co. vs. Virginia Steamship Co. 24 How. (U. S.) 307.

A vessel must allow sufficient margin for the contingencies of navigation in undertaking to avoid another vessel, and must take decisive measures in time.

Wells vs. Armstrong, 29 Fed. 216.
Homer Ramsdell Transportation Co. vs. Campagne Generale Transatlantique, 63 Fed., 845.
The Steamship Pennsylvania, 24 How. (U. S.) 307.

The burden of proof in establishing the defense of an inevitable accident is upon the appellants. They must satisfy the court by convincing proof how the accident occurred, and that they were not in fault and that no act of negligence or omission on their part could have contributed to bring about the accident.

The Helen R. Cooper Fed. Cos. No. 6334.
The Steamship Pennsylvania, 24 How. U. S. 307.
The Oregon, 158 U. S. 186.
Granite State 70 U. S. (3 Wall.) 310.
The City of Lynn, 11 Fed., 339.
The Brady, 24 Fed. 300.

The fact that a vessel propelled by steam runs into a schooner properly moored at a dock, is sufficient proof of fault on her part, and it rests with the steamer to exonerate herself from all fault, and in order to avoid liability must show that the greatest caution and vigilance were observed, and ordinary care under such circumstances will not relieve the boat which commits the injury from responsibility.

Mills vs. The National Holmes, Fed. Cas. No. 9613.
Guthrie v. City of Philadelphia, 73 Fed., 688.

We submit that on these questions of negligence, which are clearly established by the proof, that the Honorable District Judge's finding, being a finding of fact, should be decisive and conclusive upon these matters and binding upon this Court.

II.

(1) Appellants' next charge, that Appellee's injuries were caused by his subsequent acts, which were the proximate cause of his injury, has no support whatever in the testimony, which clearly shows that Appellee acted with the greatest diligence that a man could possibly exercise in endeavoring to escape injury and protect himself. Counsel's argument under this heading consists in endeavoring to twist and misrepresent the true facts shown by the evidence.

Witness Waldron testified (Record 96):

"Q. Did you start to run before you yelled, or did you start at the same moment?

A. I started—I was running when I yelled, and just made a jump.

Q. What was Newman doing at that time?

A. He was in this position (showing), boring.

Q. Was he stooping over?

A. He was in a stooping position.

Q. About how far was he behind you when he started to run?

A. Well, I passed him four feet.

Q. When he started.

A. Yes, sir.

Q. Was there a very long time intervened between the time that you hollered and the time that Newman ran? A. No, sir.

Q. About how quick was it?

A. Well, I could not say how quick it was. It was short.

Q. State whether it was almost instantaneous or whether there was a space of time in there.

A. It was almost instantaneous.

Q. (Mr. Metcalfe.)—Were you standing further aft on the vessel than Newman was?

A. I was standing—no, I was not any further aft; I was just about the same distance aft.

Q. How was it you could run past him and run four feet before you did pass him?

A. I was standing on the outside corner of this hatch talking to him, and he was working in the center of the hatch."

(And on Record 95)—

"Q. What was there at that time that attracted your attention particularly to the Steamship 'Homer' coming in?

A. That was probably the loom of her alongside, more than anything else.

Q. Now, then, when you saw her she had not struck?

A. She was just—she struck just as I jumped; she had not struck at the time I seen her.

Q. But she struck at the time that you hollowed to Newman?

A. No; she was just striking as I hollowed to Newman.

Q. You hollowed to Newman? What did you say to him?

A. I do not remember what I said to him. I said 'look out,' or 'get out of the way,' something.

Q. Now, you started to run?

A. I was running then.

Q. What did Newman do?

A. The last I seen of him he was just turning to follow me, as I thought.

Q. He did not run at all?

A. Well, he was not running when I—at that time he was just turning when I seen him.

Q. Did you not see him running to get his coat or some of his tools? A. No, sir."

(And on Record 99)—

"Q. Now, then, when you first saw the 'Homer,' did not you hollow out to him? A. No, sir.

Q. What did you not?

A. Because I had not time; I hadn't time; I made a jump.

Q. When you turned and looked at the ship, and saw her coming there, you did holler out to him, then?

A. No, sir.

Q. Why did you not holler out?

A. I was too badly excited. I was thinking of my own safety."

Mathew Anderson testified (Record 200) that he was working on the hatch with Newman; that he ran on one side of the hatch and Newman on the other; and testified (Record 202):

"Q. Did the captain of the 'Homer' give you any warning of her approach by blowing his whistle?

A. No, sir; not that I could hear.

Q. So that you had no warning of danger, before it was right on you, did you?

A. Not any warning until I heard things commence to rip and tear. For my part, I never look out for any warning from a steamer or anything coming around, because they ain't supposed to run into you. They come sometimes and rub right up against you. I never think of anything like that; so if I had seen her come I would not have thought of it."

And on cross-examination (Record 202-3-4) testified:

"Q. How far were you from Mr. Newman when the 'Homer' struck the 'Blakely?

A. About six feet at that time.

Q. On which side of the ship?

A. On the starboard side. The starboard side was out and the port side up against the wharf.

Q. Did you start to run before the 'Homer' struck?

A. No, she was —— I just heard things commence to tear as I ran.

Q. Now, did you not turn around and see the 'Homer' before she struck? A. No, sir.

Q. Did not? A. No, sir.

Q. Did Mr. Newman begin to run before the ship struck?

A. He started to run just about the same as I did.

Q. I ask you if he started to run before the ship struck?

A. Well, it might have been a second before.

Q. Did you start to run before the ship struck?

A. No, sir.

Q. You saw Newman running, then, before you ran; is that it?

A. Well, I think I ran first.

Q. You think you ran first?

A. Yes, sir.

Q. What did you run first for if you did not see the ship? You only ran after you heard the collision, did you?

A. Well, her masts then were striking, that is what tore out this yard arm, and then the ship herself commenced to tear.

Q. You think you ran before Newman did?

A. Well, probably a second or a half a second. A second is very long when you do not know where to run to. That is the way I concluded. I did not know whether to try to jump overboard to get out of the way, or—" Appellee testified (Record 128):

Q. How far, then, had you run before you were hit, as you claim?

A. I will tell you: the hatch is six feet by eight feet—eight feet long and six feet across the beam; well, I must have run kind of angleways there to get between the mast and the hatch, I was on the starboard side—I must have run close, somewhere, to seven feet, seven or eight feet, I ain't particular, I ain't sure, but somewheres about that; but I was past the main mast when it struck me; I had my hand against the main mast when I run by, I pushed myself, and she struck when I ran; that kind of knocked me against the main mast, and I pushed against the main mast to get quicker away from it; that is the way I remembered the main mast; I pushed from the main mast with my hand toward the port side to get further away.

Q. How far of, Mr. Newman, was the steamer from the brig at the time that this fisherman 'hollered' to you?

A. When I turned my head around she was close up, sir; when I looked up there was the bow right there, and when I looked up, when I seen the man 'hollering' in the ventilator, my mind struck me like there is danger, and I ran.

Q. You do not know anybody who was around there, do you? A. No, sir.

Q. You do not know anybody who spoke to you?

A. Not at the time. I had my head down at the time, fastening a piece of wood down, sir."

And on redirect examination (Record 141) testified:—

"Q. Did you attempt to get out of the way of any danger immediately upon discovering the Steamship 'Homer' coming at the Barkentine 'Blakely?'

A. I never looked around to see what boat it was; I simply grabbed my coat and ran.

Q. You got away as quick as you could, did you?

A. As quick as God ever let me. If I was not a sailor I might have stood and looked at her, but when I seen the man at the ventilator, that put me on my guard that there was danger.

Q. You say you grabbed your coat? A. Yes, sir.

Q. Did it take any length of time to stop to grab your coat?

A. Well, about as long a time as you would say 'Jack,' because it was right at my feet where I kept it; it had a two hundred and thirty-four dollar check in it,

in my time-book in my coat pocket, and I just took it off about half an hour before that and laid it right in my shoulder box that I unshift my bits and every thing in, and it was right there where I worked; I simply grabbed it; there was nothing to stop me at all, simply reach my arm down and reach my coat and run down; if it wasn't for the two hundred and thirty-four dollar check I don't know that I could have taken it, but I wanted it safe for that.

Q. It did not delay you in getting out of the way, did it? A. No, sir."

Under such testimony, which is all the testimony there is upon the point, it does seem idle to waste further time in answering to Appellant's charge of negligence against Appellee. It comes in poor grace from Appellants to say that Appellee was not sufficiently active to escape being injured, when they took no steps whatever to warn him of the danger he was placed in by reason of their gross carelessness, which they could have done without any effort whatever by giving a danger signal when they knew that their vessel was beyond control and was going to crash into the "Blakely." The Honorable District Judge's findings in this respect are fully supported by the evidence, correct, and should be treated as conclusive.

III.

Appellants' next contention is that the collision did not cause the injury, and that Appellee was not injured by the collision. The testimony is conclusive that Appellee was injured by the block and pendant being

torn loose and hurled by the force of the collision against the Appellee.

Witness Brown, who was standing on the dock at the time of the collision testifies (Record 101-2):

"Q. What, if any, part of the rigging did you see broken or torn or carried away?

A. Oh, well, there was chain plates that was broken and one of the —, I forget the name of the rope; I was standing there looking and it seemed to be pretty well all broken, at least, all torn loose.

Q. Did you see anything drop from aloft?

A. I see the block coming down, and the end of the block and the wire rope on it, or wire cable.

Q. Did it come down with much force?

A. It came down like—the same as you would strike a whip. Then I started to run myself.

Q. Did you see whether or not that struck Newman?

A. No, I did not. I started to run when I saw that.

Q. Did you see whether or not that was lying here where Newman was lying? A. Lying right by him.

Q. That was immediately after the accident?

A. Yes. sir."

Appellee testified, on cross-examination (Record 131-2):

"Q. When you were hurt did you fall forward on your face, or did you fall on your side, or how?

A. It knocked me right down, sir; right flat on my face, sir.

Q. Then what did you do after you were knocked down?

A. When I opened my eyes I remember seeing fire at my eyes, and then black before my eyes, all black; well, when the black went away it was in my mind she was sinking.

A. The boat, the 'Blakely.' It was in my mind she was sinking, and I wanted to jump quick up and make for the wharf, and I raised my shoulders up and my lower part refused; my back was just like broke in two, and I couldn't handle it at all, and I hollered right away to take me on the dock.

Q. You did not know of your own knowledge what struck you, Mr. Newman?

A. Yes, sir; the block there, sir, next to me.

Q. No, I asked you if you knew of your own knowledge what struck you?

A. Of my own knowledge?

Q. Yes. You can't personally testify to what did strike you; all you know is just a mere supposition, is it not?

A. All I know is that when it struck me it covered my back, and the block, when I opened my eyes, it was right close to me, when I turned my head.

Q. Yes; but you do not know what struck you, you cannot testify positively to what struck you, can you? You only suppose it was the block?

A. Well, I didn't see what struck me when it struck me; I was running for the wharf and that struck me in the back.

Q. Whatever struck you struck you in the back, but you did not know what struck you at the time?

A. Well, the block was there next to me, and I supposed that struck me.

Q. That is, you supposed it was the block, you do not know it?

A. That is the only thing I know. I was knocked down and when I opened my eyes that block was there.

Q. You saw the block there?

A. Yes, sir; close by me.

Q. But you cannot testify of your own knowledge, that the block struck you?

A. Well——

Q. That can be answered "yes" or "no."

A. Well, I don't know about that; I don't know about that because it was a big piece that struck me; it was a big piece, I can swear to that; it was a big piece.

Q. You simply know that something struck you?

A. Something big; yes.

Q. And you do not know what that was?

A. Something big struck me.

Q. But you can't tell what it was?

A. The only thing I can tell, the block was next to me.

Q. I understand; but can you tell, can you testify, what it was? You simply know that something big struck you and that is all?

A. Yes, and the block laid right alongside of me."

Mathew Anderson testified (Record 200-1):

"Q. Now, did you see Mr. Newman when he got hurt?

A. He was about six feet off from me.

Q. From you? A. Yes, sir.

Q. Did you see him struck with any timber or block. or anything?

A. No, I did not see him exactly struck, but I seen —I heard the crack of the pendant just as I ran, and I turned around and looked on the deck, and there he was about four or five feet that side, and this block lying right alongside of him and he was down on his knees, and I know that the block fell there, and I could not see no mark on the deck that that block would have made if it had struck the deck. We were working on what we call the scuttle about the hatch. I was working about this end of it and he was working there (illustrating), putting on some slags, when the thing happened. I ran on this side and he was trying to get away on the other side, between that and the mast. And I looked behind me when I heard the end of this pendant strike the deck and the rail; the end hung on the rail—the end that came off of here; and the distance from this rail to this hatch was about eight feet.

Q. Now, was Mr. Newman knocked down?

A. Yes, he was knocked down.

Q. Did they have to help him up? A. Yes.

Q. What, if anything, did he say at that time?

A. He says, "My back is broke." He says, "Anderson," he says, "take care of me." That is all he said. I says, "We will do all we can for you." Then

I went and called one of the crew to help me as quick as he could to get him on the dock. The tide was low and I could not get him up there alone. I got three or four of the boys there."

And on cross-examination testified (Record 205):—

"Q. You saw nothing strike Mr. Newman?

A. I did not see it strike him, but I heard the thing falling, the wire falling along side of him, and I asked—

Q. I asked you whether you saw anything strike Newman. You can say "Yes" or "No" to that question.

A. No, sir; I did not see it strike."

And on redirect examination (Record 205):—

Q. But you saw the block right by him immediately after he fell? A. Yes, sir.

Q. Or at the time he fell? A. Yes, sir.

Q. And the place where the block naturally belonged was away up on the mast? A. Yes, sir.

Q. It was about the only thing you saw fall down there right where he was?

A. That was the only thing that fell down from aloft anywhere.

Q. That was the only thing that could have hit him in the back, was it not, was the block? A. Yes."

Witness Waldron testified (Record 92):—

Q. What did you see there?

A. I seen the forebrace pendant and block lying across the deck when I went to help Newman. It was lying right by the side of him, and it was closer to the

mainmast than it was to the rigging, lying in that shape across the deck.

Q. Was there any part of the ship lying there that had been torn loose besides that?

A. There was a broken brace.

Q. Did Mr. Newman seem to be suffering much pain?

A. He seemed to be suffering considerable pain. There was tears running out of his eyes. When we got him on the dock he was lying there moaning, and he kept telling us that he was hurt.

Q. He had been hurt? A. Yes, sir.

Witnesses Roberts (Record 115-118), Dodge (Record 106) and Gregg (Record 110) all testify to substantially the same as Anderson, Brown and Waldron, to the effect that the fore yardarm brace and block were torn away, which was about 45 feet above the deck of the "Blakely," and was lying right beside Appellee immediately after the collision, and that those were the only parts of the vessel lying close to Appellee. So that under the evidence the charge of Appellants that it is mere supposition on the part of the Appellee and his witnesses that he was hit by the block, is contrary to the evidence of all of these witnesses, and has nothing to rest upon, except the testimony of Claimant's witness Gilbertson, who testifies that although the block and pendent were torn loose from their bearings and fell on the deck of the "Homer," still when the "Homer" backed off they were drawn overboard and fell into the water. While seven witnesses testify positively that the block and pendent fell on the deck of the "Blakely" and lay

right by the side of Appellee immediately after the collision.

IV.

It is next urged by Appellants that the Appellee was not seriously injured; that his injuries are not of a permanent nature. The manner in which the Appellee was injured shows conclusively that the injury was of an exceedingly severe and serious nature. The evidence shows that he was injured by a large block striking him in the small of the back, which was torn loose from its bearings at least 45 feet above the deck; that ropes passed through the block, running to the rear, and great force was exerted upon these ropes which tore the block and pendant from the fore-yardarm, so that they were thrown with tremendous force against the Appellee, and the only wonder is that he was not killed.

Witness Gregg testifies (Record 110-11):

"Q. What condition was Mr. Newman in?

A. He was lying with his hand like that (showing) on his side, and as we picked him up he fell through our hands kind of and against the rail there, and we picked him up again, three of us, and hoisted him to the wharf; and from the wharf we took him in the office on Schwabacher's dock. He was hurt pretty bad, because the tears came out of his eyes.

Q. State whether or not Newman appeared to be hurt very much or not, or injured very much?

A. Well, he acted very much like it by his crying. If a man is hurt very bad the tears come in his eyes; I know I would.

Q. Did you see an expression of pain in his face?

A. Yes; it was very pale, indeed.

Q. Did he moan much? A. Yes, sir.

Q. Was he able to walk, or did you have to carry him? A. We had to carry him."

Witness Roberts testifies (Record 115):

"Q. State whether or not he (Newman) was injured, and if so, to any extent?

A. Well, he seemed to be suffering with great pain across the small of his back; he could hardly move after I got him onto the dock, or into the office on the dock; we laid him with his face down on the bench, and one leg was hanging off, and he could not get that leg back on the bench again, and I had to put it back for him.

Q. Did not seem to have any control over his legs?

A. No, sir.

Q. Seemed to be paralyzed, his legs?

A. Well, he seemed to be paralyzed."

And on cross-examination testified (Record 117):

"Q. I understood you to say a moment ago, that after you took him on the dock and then took him to the office that he put one arm around your neck and the other arm around another fellow's neck?

A. Yes, sir.

Q. And walked along with you to the office?

A. Well, he kind of dragged himself along.

Q. He lifted his legs as he went along?

A. Yes, he moved them somewhat, but he bore no weight on them.

Q. He leaned on you and walked himself, walked on his legs. He stood on his legs, did'nt he?

A. No, he did not stand; we just kind of dragged him along. Of course he moved them some, but he dragged them along.

Q. You mean he walked slow, and moved one after the other, didn't he?

A. Well, I couldn't say about that exactly, whether he moved one after the other or whether it was more of a drag; it was more of a drag than anything else.

Q. Did he drag both feet?

A. Part of the time he dragged both feet."

Witness Brown testified (Record 101):

"Q. What condition was he in at the time?

A. He claimed he was hurt pretty bad. He says, "For God sake, boys, take me on the dock."

Q. Did he seem to be suffering any pain, and to what extent?

A. Well, he seemed to have tears in his eyes when he was taken on the dock.

Q. Was he moaning any? A. Yes, sir.

Q. Making any outcries of suffering?

A. White around his lips; oh, yes, and seemed to be in pain.

Q. State whether or not he was in a helpless condition. A. He was.

Q. Was he carrried on the dock?

A. He was carried on the dock and then carried into the Schwabachers's office there."

Witnesses Waldron (Record 93) and Dodge (Record 107) testified substantially to the same effect.

Appellee testified (Record 124-5):—

"Q. State whether or not you have suffered any pain from your injuries, and, if so, to what extent?

A. I am suffering every day, only I am a little easier now; but the first three weeks, first four weeks, I suffered pretty bad, but the last few weeks now I feel a little easier; I can't be moved; if I am moved a little bit the pain comes back as bad as ever, but if I am left very quiet, like now, my pain eases down.

Q. Have you been able to sit up any since you were injured?

A. No. I can't lay on my side, even; I have to lay on my chest, that way, on the pillows, and when he wants to lay me around he lifts up my head a little and shifts me just a little, to leave the weight on the other side.

Q. Can you turn around without assistance?

A. I can't handle my lower part; I can handle my shoulders, my arms, but I can't handle my lower part at all; everything goes to the back just as soon as I put a little strain on my back; I can't handle the thing there; that is as bad as from the first minute when I was hurt—the lower part; from where the pain is in my back upwards to my shoulders is easy.

Q. How long did you remain in the hospital?

A. Three weeks to a day.

Q. How long have you been over here at your home?

A. This is the eighth week. It was seven weeks on Wednesday that I was hurt, and this is the eighth week.

Q. What was your age at the time you were hurt?

A. Well, I was born in 1862, the 18th of February, so you can figure it out.

Q. State what was the condition of your health prior to the time you were injured.

A. I was as healthy as I could be; I never wish to feel any better in my life."

And testified (Record 126):—

"Q. You may state whether or not you will ever be able to follow your work again.

A. No, sir. My work is all back work; I will never be able to do any more carpenter work; I might do some light work by not bending, or anything like that, but not ship carpenter work; it is all heavy work, and your back has the main strain in ship work."

Witness Thomas who was appellee's nurse, testified (Record 144-5):—

"Q. Have you seen Mr. Newman lately?

A. See him every day.

Q. State whether or not you have been employed by him to wait on him. (Objected to.) A. Yes, sir.

Q. Go ahead and state what you have done with reference to taking care of him. (Objected to.)

A. Well, I started on the 19th of May, and I lived in about thirty feet apart; I stayed there a considerable, but I was either there or in my own house continually. What I was doing was attending to him, turning him and attending him with a bedpan and urine and so on. That was my business.

Q. State whether or not he was suffering a great deal at the time you started to wait on him. (Objected to.)

A. Yes, sir; especially when I would be moving him, turning him, you know, in the bed; and the worst of the whole of it, I guess, was the bedpan; it broke him all to pieces.

Q. State what kind of food he subsisted on.

A. Well, Mrs. Newman was attending to that principally, but the first month he subsisted, I think, entirely on milk, because I was—"

Mr. Metcalfe—"One minute—."

And testified (Record 147):

"Q. Now, how about making his water?

A. Well, he was suffering a great deal; his urine is very troublesome.

Q. State whether or not he suffers at the present time a great deal.

(Objected to.)

A. Well, yes.

Q. State what the condition of his water is when it passes from him.

A. Well, his water is bad, undoubtedly. I sent over here Saturday to the doctor to get something again for him; and there is a good deal of sediment in it.

Q. State whether or not he has control over his water, in making his water, and over his bowels, or whether they have to administer to him.

A. In regard to his bowels, he has to take some physic continually to operate them.

Q. State whether or not he has use of his lower limbs.

A. Well, he has no use at all."

And on cross-examination testified (Record 150):

"Q. Don't say what you think. I want it from your personal knowledge. How about Mr. Newman's being able to turn over; can he turn in the bed at all?

A. Not by himself.

Q. Can he draw liis feet up at all?

A. No, he cannot draw his feet up. I have to move his limbs and take all of him, you know, by here and the legs. (Illustrating.)

Q. When he wishes to, cannot he use them—that is, draw them up a little bit?

A. I have not seen him at all; I do not think he can, because——

Q. You have never seen him try, have you?

A. Yes, sir; I have seen him try. He is trying every time he is helped, to a certain extent.

Q. Does he complain of much pain?

A. Well about the time he gets on the bedpan; to get him on the pan and off, that breaks him up entirely, even now; it was terrible at first."

DR. MILLER, attending physician, testifies (Record 168, 169, 170):—

"Q. Yes. I will now ask you to go ahead and state the facts concerning his injuries.

A. When I was called to see him I found him in the Providence Hospital, lying in a bed, No. 15, I think—room 15. On examining him I found that he was lying partially on his face, with his face down; his legs partially extended and supported by a pillow. On looking

over his body I observed considerable discoloration of the skin over the fourth and fifth lumbar vertebræ; and it was at this particular spot of which he claimed he was suffering very greatly. On attempting to make him draw up his legs, in order to discover whether there was any injury or not, I found that titillation of the soles of his feet and other measures besides the issue of a pin seemed to have no effect upon him. The legs remained straightened out and perfectly helpless. The following day he suffered retention of the urine; and, if I recollect, I think on two or three subsequent occasions after that he passed his urine with more or less suffering. I attended him daily at the hospital from the 1st until about the 15th of May, at which time he went home. He was carried home on a litter and I made four or five or six visits since. He is now just as helpless as he was when I first saw him; still lying practically on his face, though occasionally he finds it easier to lie on his back.

Q. I will ask you whether or not he has any control of his lower limbs. A. None at all.

Q. I will ask you if you have made any examination, Doctor, for the purpose of determining whether or not his injuries are likely to be permanent.

A. Yes, sir, I did.

Q. I will ask you to state whether or not they are likely to be permanent.

A. It is more than probable that they will be permanent, although there is a possibility—a bare possibility—of his regaining more or less of the use of the limbs, but it is a question if he will ever be able to walk.

Q. I will ask you if you have made any examination lately with reference to his power over the muscles of his legs? A. Yes.

Q. I will ask you whether or not he has any power over them? A. None at all.

Q. I will ask you if you can state the extent of the injury to his spinal column or the lower lumbar vertebræ?

A. The clinical conditions which I observed would indicate that the branches that emerge from the lower portion of the spinal cord are crushed.

Q. That is the nerves extending out from the lower end of the spinal cord? A. Yes.

Q. In case that is the manner in which he is injured, is there any likelyhood, even, of his ever having the use of his lower limbs?

A. It is barely possible, but not probable.

DR. WOTHERSPOON testified (Record 188-9):—

"Q. Now, what would you say was the cause of his lack of control, Doctor, over his limbs—the lower part of his body?

A. Some injury to the motor roots of the lower lumbar nerves and the upper sacral nerves, or some injury to the lower end of the spinal cord itself.

Q. No other thing could produce that result, could it, that you found in his condition? A. No other thing.

Q. Nothing else could produce that result?

A. Not that I have ever heard of, under the circumstances.

Q. Did you notice any discoloration on his back when you first examined him?

A. There was a faint, yellow discoloration in the lumbar region on the 28th of May. It was the last disappearing trace of the discoloration; that I asked at the time.

Q. I will ask you whether or not, in your opinion, he will ever be able to use his limbs so as to get around and follow his previous occupation of ship carpenter?

A. He might recover. He may be able to use his limbs yet. That is a question that I could not answer very definitely.

Q. Well, about what would the chances be?

A. I could not even estimate the chances, because I do not know the amount of injury to the nerves or spinal cord.

A. Well, does the amount of injury indicate itself to any great extent in the condition you find him in? Would it not necessarily be a serious injury to produce his condition?

A. The amount of improvement in two months is so very little that at the same ratio he practically could not be well at the end of his life. The injury, as he is at present, is very severe, and if he does not continue to improve at a more rapid pace than he is at present it will be a long time before he is well, if he ever is.

Q. If he ever gets well? A. If he ever gets well.

Q. Are not such injuries to the spinal column and cord about the most severe injuries to the body?

A. They are always serious injuries.

Q. And the most difficult to recover from?

A. Yes; they are among the most difficult ones."

And on cross-examination (Record 192-3-4):

"Q. Then, what did you determine was the matter, or have you yet been able to determine what the matter was?

A. You mean the actual pathological lesion?

Q. Yes.

A. That is, the internal disarrangement of the nerves and the spinal cord?

Q. Were you able to determine that?

A. I could not determine that.

Q. Could you have determined that by a surgical operation?

A. I do not know whether I would have nerve enough to cut deep enough to absolutely determine that, unless he was dead; because in that condition I would have to cut through the entire section of the sacrum, and as the sacrum at that point is a very vital thing for the good and the support of a man's body; I could not do it because it would destroy the perfect sacral—what we call the perfect sacral bones here, of which the sacrum is the keystone point, and as the nerves emerge in front of it or in the true pelvic cavity, the only way I could get in there from behind would necessitate cutting through the entire thickness of the sacrum, and of course it is absolutely ridiculous.

Q. Do you mean to say that you would have to cut as deep as that to ascertain where this injury is?

A. Yes; I might have to cut at least over two inches.

Q. You might have. Now, how do you know you would—you have not made that examination?

A. Well, I have dissected a great deal in subjects.

Q. Well, I know, but I do not mean—I am not testing the question of how thick the incision would have to be, except that you have made none at all to ascertain the fact of where the injury was.

A. Well, we have certain evidence in this man, from the nature of his injury, that can only arise from an injury to the nerves or the spinal cord.

Q. Now, which is it?

A. The nerves or the spinal cord?

Q. Yes. A. Well, I cannot absolutely say; maybe both, maybe one, or it might be the other.

Q. Then you really do not know today whether it is one or both? A. Maybe both.

Q. I ask you whether you know today after three months' examination of the man, or having examined him three times, you do not know today whether it is an injury to the spinal cord or the spinal nerves.

A. I know it is one or the other.

* * * * * *

Q. Then your reasons, as given here, are to a certain extent speculative, are they not? A. Which reasons?

Q. The reasons for what his real injury is?

A. No, they are not speculative; there is a distinct lesion either in the nerves or spinal cord; that I am certain of.

Q. Well, which is it?

A. As I said before, I cannot answer absolutely which it is. It is one or the other."

The manner in which Appellee was injured was such as to almost of necessity cause injuries which if not fatal would surely be of a permanent nature. The condition in which Appellee was taken to the hospital and was in for months afterwards, shows clearly that there could be little, if any doubt as to the permanency of his injuries, and that he will be a cripple for life. The Court's findings in this respect is supported by the evidence, correct, and, being a finding of fact, should be conclusive upon the subject.

It is next urged by Appellants that Appellee and his proctors have refused the Appellants permission to have a medical examination made of Appellee by such physicians as Appellants saw fit to choose, and that Appellee and his proctors have prevented Appellants from making such an examination for the purpose of covering up the truth. This charge is made in bad faith by proctors for Appellants, and is known by them to be untrue, and is made for the sole purpose of endeavoring to cast a cloud upon Appellee's claim against them. Proctors for Appellee, after consulting with Appellee, notified proctors for Appellants on September 25 that they could make a medical examination of Appellee if they desired, as shown by the Record (page 366).

"Mr. MARTIN.—At the close of the tetimony on Saturday, Mr. Metcalfe, the proctor for the claimant, requested or asked me if the libellant would consent to a medical examination on behalf of claimant. At that time I had not spoken to libellant about the matter; as it would necessarily cause him considerable pain, I did

not feel that I would be justified in binding him to any such agreement at that time. I have seen him since and he states that he is perfectly willing to undergo a medical examination by any reputable physician, or more than one reputable physician—as many as claimant wishes—at the same time, in case the claimant desires to have such a medical examination made. On behalf of libellant, as his proctor, I request the claimant, if he wishes to have such a medical examination made, to name one or three physicians at this time, and we will have these physicians subpoenaed to appear here Thursday afternoon and testify; and in the meantime they can go and make the medical examination of libellant. I desire to have the testimony in and closed so as to be filed Saturday.

MR. METCALFE: You were to inform me, when I requested, if you were willing that that should be done. I have now to see some reputable physicians and ascertain whether I can procure their services so as to testify which I will endeavor to do in the most convenient manner and time. I formally give notice that I do not expect this case to be closed by the 30th of September. I have other witnesses.

MR. MARTIN: We have no objection, but we do insist that the examination take place tomorrow, or Wednesday or Thursday of this week. The libelant is here at West Seattle, within easy reach, and I do not want the case dragged out any further."

On the 22nd of September an affidavit was filed by William Martin, proctor for Appellee, asking to have

the testimony returned which was taken and reduced to writing by the commissioner, as proctors for Appellants had taken no steps to take any further testimony or to have a medical examination made, although requested frequently by proctors for Appellee to do so. The same was brought on for hearing before the Honorable District Judge on the 30th of September, and on the affidavit of William Martin (Record 68), setting forth these facts, and the affidavit of J. B. Metcalfe and George Fritch (Record 57 and 64), the court refused to require the commissioner to file the testimony. And upon said hearing proctor for Appellee consented in open court to have the court name such physicians as it desired to have make a medical examination of Appellee, to which proctor for Appellants objected, and refused to permit the court to name any physicians to make a medical examination, and also refused to name any physicians themselves.

In the affidavit of J. B. Metcalfe (Record 62) he swears that he could have all his testimony taken and his medical examination made by the 1st of November, 1899, or during the first week in November, 1899. Notwithstanding this, the Appellants refused to take any steps toward having a medical examination made thereafter, although frequently requested to do so by proctor for Appellee, in case they desired to have a medical examination made.

The case dragged along from September until in November, when Appellee again applied to the Court for an order fixing the date upon which Appellants

must complete their testimony and within which they must make a medical examination in case they desired to have one made. An affidavit was made by William Martin, proctor for Appellee (Record 408), setting forth all the facts, which were uncontradicted. That thereupon proctor for Appellee procured an order from the Court, fixing the 15th day of November, 1899, as the time in which Appellants should close their case. That prior to the Court's signing said order it was O. K. by J. B. Metcalfe, proctor for Appellants. That notwithstanding this order Appellants took no steps to have a medical examination made, although frequently requested so to do by proctor for Appellee, and cautioned and notified by proctors for Appellee that unless they had a medical examination made of Appellee prior to the 15th of November, that Appellee would refuse to consent to a medical examination being made at all.

After these proceedings were had, and the 15th of November had gone by, proctors for Appellants made application to the Court for an order requiring Appellee to submit to a medical examination, which order was properly refused by the Honorable District Judge. So that under these circumstances Appellant's proctors are quite correct when they state in their brief (page 42), "that the application to the Court for this order was not made expecting it to be granted." The Court will perceive from this that if any person has been endeavoring to keep anything in the dark in this case, and the truth from coming out, it has been the Appellants.

Proctor for Appellants is well acquainted with Appellee, had seen him and talked with him, and knew full well the critical condition he was in, and did not dare to hazzard a medical examination by any fair physicians in the court below, for fear such an examination would more clearly show the condition Appellee was in, and consequently enhance the damages which the lower court would have awarded him. But after taking the opinion of the Honorable District Judge upon the evidence, and he having awarded to Appellee the full limit of the bond and amount which Appellee could recover, Appellants now make a great furore that a full, fair and honest investigation was deprived them.

This is the same tact they attempted to pursue before the Honorable District Judge in the District Court, even after they had repeatedly been notified that they could have a medical examination made if they desired one. That they were endeavoring to mislead the Honorable District Judge by such a course was clearly shown when proctor for Appellee in open court requested the court to name such physicians as the court saw fit, to have a medical examination made, to which proctor for Appellants objected, and refused to permit the court to name such physicians as the court saw fit, to make a medical examination. Whereupon the court refused to require the Appellee to submit to a medical examination made by physicians which Appellants saw fit to choose after they had peddled the testimony of Appellee's physicians around through the city in an endeavor to procure testimony from physicians to contradict the testimony of Appellee's physicians, so that they would know what

their physicians were going to testify in advance of the examination.

Appellants' course throughout this case has been one of unnecessary delay, and he has sought in every way to harass and embarrass Appellee. Even after the testimony was filed it was only after repeated efforts that Appellee was able to secure a hearing before the Honorable District Court on account of the efforts of Appellant's proctors to prevent such hearing as long as possible, giving all manner of excuses and engagements which they had so that they would not be able to attend the hearing.

V.

The rule of practice in the United States District Court for the District of Washington, Northern Division, is to enter judgment against the claimant, and, in case the stipulators do not perform the condition of their bond within ten days thereafter, to cite the stipulators to show cause why judgment should not be entered against them. This, the Court is not required to do, and could have entered judgment against the stipulators at the time of entering judgment against the claimant but, out of over-precaution for the protection of the stipulators, allows them a hearing in court prior to the entering of judgment against them. The condition of stipulator's bond is, that they will abide by and perform the terms and conditions of the decree; and in admiralty they are not permitted to appeal from the decree.

The first appeal taken should be dismissed, as having been prematurely taken, and the appeal taken by the

Stipulators should be dismissed, for the reason that Stipulators have no right to appeal in admiralty. It was necessary that judgment should be entered against the Stipulators as well as the Claimant, as the Stipulators's bond stands in the place of the vessel, and the vessel is the real respondent in this action. So that had the Court not cautioned Claimant and Appellant, out of consideration for Appellant, that his first appeal was premature and would likely be dismissed, the second appeal in all probability would never have been taken.

There is no error in the rulings of the Honorable District Judge in this respect.

VI.

The questions presented on this appeal are almost all purely questions of fact, and we submit that the findings of the Honorable District Judge upon all the points raised by Appellants are conclusive and binding upon this Court; that they are correct, and are fully supported by the evidence; and that the decree and findings of the Honorable District Judge should be confirmed.

We also submit that there is no merit in this appeal, and that costs, damages and interest should be awarded Appellee upon the appeal bond in the sum of two thousand five hundred dollars.

Respectfully submitted,

MARTIN, JOSLIN & GRIFFIN,

Proctors for Appellee.

May 1st, 1900.